KILPATRICK TOWNSEND
ATTORNEYS AT LAW

KILPATRICK TOWNSEND & STOCKTON LLP
www.kilpatricktownsend.com

Suite 1400 4208 Six Forks Rd.
Raleigh NC 27609
t 919 420 1700 f 919 420 1800

Todd S. Roessler
direct dial 919 420 1726
direct fax 919 510 6121
TRoessler@KilpatrickTownsend.com

April 7, 2016

Via Hand Delivery

Office of Administrative Hearings
New Hope Professional Center
1711 New Hope Church Road
Raleigh, North Carolina 27609-6285

Re: *Owens v. NCDEQ, et al.*, No. 15 EHR 07012

Dear Clerk:

Please find enclosed for filing an original and one copy of Respondent-Intervenor Weyerhaeuser Company's Memorandum of Law in Response to Petitioners' Motion for Summary Judgment in the above-captioned matter.

Please return one file-stamped copy of these pleadings to us via our courier.

Thank you for your assistance with this matter. Please do not hesitate to call if you have any questions.

Sincerely,

Todd S. Roessler

Enclosures

11298813V.1

STATE OF NORTH CAROLINA COUNTY OF PERQUIMANS	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 15 EHR 07012
STEPHEN E. OWENS and JILLANNE G. BADAWI, Petitioners, v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF ENERGY MINERAL AND LAND RESOURCES, Respondent, and WEYERHAEUSER COMPANY, Respondent-Intervenor, and PASQUOTANK COUNTY, Respondent-Intervenor.	**RESPONDENT-INTERVENOR WEYERHAEUSER COMPANY'S MEMORANDUM OF LAW IN RESPONSE TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT**

Weyerhaeuser Company ("Weyerhaeuser"), by and through its undersigned counsel, respectfully submits this Memorandum of Law in Response to Petitioners' Motion for Summary Judgment.

INTRODUCTION

This is a contested case in which Petitioners, Stephen E. Owens and Jillanne G. Badawi, seek to challenge a determination made by Respondent, the North Carolina Department of Environmental Quality ("NCDEQ"),[1] Division of Energy, Mineral and Land Resources

[1] Effective September 18, 2015, the North Carolina Department of Environment and Natural Resources ("NCDENR") was renamed the North Carolina Department of Environmental Quality.

("DEMLR"), that a wind energy facility for which development began seven years ago, government approval was received five years ago, and construction commenced nearly one year ago, is not subject to burdensome and duplicative permitting requirements. Respondent's determination that the wind energy facility at issue (the "Desert Wind Project") is not subject to the permitting requirements of Session Law 2013-51, An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, codified at N.C. Gen. Stat. §§ 143-215.115, *et seq*. (the "Wind Act") is: (i) consistent with the plain meaning of the statutory language and legislative intent; (ii) reasonable and based on a permissible construction of the statute; and (iii) consistent with the wind developer's vested right to continue to complete the approved wind energy facility. (*See generally* Weyerhaeuser Co.'s Mem. Supp. Summ. J.)

Despite acknowledging that "[t]he Wind Energy Act does not require the FAA determinations to be active or unexpired, but simply to have been received prior to the Wind Energy Act's effective date of May 17, 2013," (Pet'rs' Mem. Supp. Summ. J. 3), Petitioners argue that the permitting requirements apply because the wind energy facility at issue is a ***new*** facility or expansion. This strained interpretation is not consistent with the plain meaning of the statute or its legislative history and must fail. The court should deny Petitioners' motion for summary judgment, enter an order granting Weyerhaeuser's motion for summary judgment, and enter judgment in Respondent's favor on Petitioners' Petition for a Contested Case Hearing.

ARGUMENT

I. Petitioners have conceded that the permitting requirements of the Wind Act do not apply to the Desert Wind Project.

Petitioners acknowledge that it is a "undisputed material fact" that:

> The Wind Energy Act does not require the FAA determinations to be active or unexpired, but simply to have been received prior to the Act's effective date of May 17, 2013.

(Pet'rs' Mot. Summ. J. ¶ 5.d.) The Wind Act became effective on May 17, 2013, and established certain permitting requirements for future wind energy facilities and expansions of such facilities. To clarify the scope of the Wind Act and to ensure that wind energy facilities that already had undergone extensive public and regulatory review, specifically the Desert Wind Project, the General Assembly included Section 2 of the Session Law 2013-51 (the "Grandfather Clause"). The Grandfather Clause provides that the Wind Act:

> [A]pplies ***only*** to those wind energy facilities or wind energy facility expansions that have not received a written "Determination of No Hazard to Air Navigation" issued by the Federal Aviation Administration on or before [May 17, 2013].

Section 2 of Session Law 2013-51 (emphasis added).

At the time the Wind Act became effective on May 17, 2013, Iberdrola Renewables ("Iberdrola") had received Determinations of No Hazard to Air Navigation ("DNHs") from the Federal Aviation Administration ("FAA") for the Desert Wind Project ("Initial DNHs"). (*See* Affidavit of Craig Poff ("Poff Affidavit") ¶ 8.a, Ex. 2 (attached to Weyerhaeuser Company's Memorandum of Law in Support of Summary Judgment).) On June 29, 2011, Iberdrola secured the Initial DNHs from the FAA for the Desert Wind Project. Despite Petitioners' argument otherwise, actual construction of the wind turbines is not necessary for a facility that has received a DNH to be exempt from the permitting requirements of the Wind Act, (Pet'rs' Mem. Supp. Summ. J. 3); the plain language of the Grandfather Clause merely requires receipt of a written DNH prior to May 17, 2013. Iberdrola has had active or pending DNHs before the FAA for the Desert Wind Project continuously since June 29, 2011.[2] (*See id.* ¶¶ 23-40.)

As recognized by Petitioners and consistent with the plain meaning of the Wind Act, because Iberdrola received DNHs from the FAA for the Desert Wind Project prior to the Wind

[2] Holding that Desert Wind Project is covered by the Grandfather Clause is also consistent with the purpose of such clauses. *See State ex rel. Utilities Comm'n v. Fleming*, 235 N.C. 660, 668, 71 S.E.2d 41, 47 (1952) ("[T]he purpose of a grandfather clause is to protect and preserve bona fide rights existing at the time of the passage of legislation which contains such clause.").

Act's effective date of May 17, 2013, the Desert Wind Project is ***not*** subject to the permitting requirements of the Wind Act.

II. Petitioners strained interpretation that the Desert Wind Project is a *new* wind energy facility or expansion and therefore subject to the permitting requirements of the Wind Act is not consistent with the plain meaning of the statute or the legislative intent.

As discussed above, the Wind Act exempts any "wind energy facility" and "wind energy facility expansion" that received a DNH prior to May 17, 2013. "Wind energy facility" is defined as:

> [T]he turbines, accessory buildings, transmission facilities, and any other equipment necessary for the operation of the facility that cumulatively, with any other wind energy facility whose turbines are located within one-half mile of one another, have a rated capacity of one megawatt or more of energy.

N.C. Gen. Stat. § 143-215.115(2). "Wind energy facility expansion" means:

> [A]ny activity that (i) adds or substantially modifies turbines or transmission facilities, including increasing the height of such equipment, ***over that which was initially permitted*** or (ii) increases the footprint of the wind energy facility ***over that which was initially permitted***.

N.C. Gen. Stat. § 143-215.115(3) (emphasis added).

Following receipt of the Initial DNHs, minor modifications were made to the Desert Wind Project. First, as a result of more efficient turbines, the number of turbines associated with the Desert Wind Project decreased from 166 to 150, which resulted in a 3% height increase of the turbines. (Poff Affidavit ¶¶ 23, 25, 34-35.) Second, some of the proposed turbine locations changed slightly. (*See* Affidavit of Kristin Triebel ("Triebel Affidavit") ¶ 6.a, Ex. 3 (attached to Weyerhaeuser Company's Memorandum of Law in Support of Summary Judgment).) However, the geographical footprint of the Desert Wind Project has not increased since the FAA issued the Initial DNHs. (Poff Affidavit ¶ 28.) The proposed Desert Wind Project has not materially changed since the FAA issued the Initial DNHs on June 29, 2011. (*Id.* ¶ 27.)

As a result of these minor modifications, Petitioners seek to create an ambiguity in the Wind Act by claiming that Iberdrola "abandoned construction" of the Desert Wind Project, (Pet'rs' Mem. Supp. Summ. J. 3), and the Desert Wind Project became a ***new*** wind energy facility or expansion that did not receive a DNH prior to May 17, 2013. Petitioners' position is inconsistent with the undisputed material facts and the plain meaning and legislative intent of the Wind Act.

Since Iberdrola obtained the Initial DNHs and other governmental approvals for the Desert Wind Project in 2011, Iberdrola has continuously sought to develop and construct the project in reliance of these government approvals. In May and August 2011, Iberdrola obtained approvals from the North Carolina Utilities Commission. (Poff Affidavit ¶¶ 8.f-g, Exs. 8-9.) In July 2011, Iberdrola obtained conditional use permits ("CUPs") from the respective Boards of Commissioners of Pasquotank and Perquimans Counties. (*Id.* ¶ 8.d, Exs. 5 and 6.) On January 19, 2012, Iberdrola obtained a Water Quality Certification under Section 401 of the Clean Water Act from the Division of Water Resources. (*Id.* ¶ 8.e, Ex. 7.) Following Iberdrola's submittal of a consistency certification to the North Carolina Division of Coastal Management ("NCDCM"), on March 5, 2012, NCDCM issued a letter conditionally concurring with Iberdrola's certification. (Resp's Mem. Supp. Summ. J. 17; Affidavit of Douglas Huggett ("Huggett Affidavit"), Attach. 1 (attached to Respondent's Memorandum of Law in Support of Summary Judgment).) On September 17, 2013, Iberdrola obtained an Individual Wetlands Permit under Section 404 of the Clean Water Act from the United States Army Corps of Engineers. (Huggett Affidavit, Attach. 3.) Following approximately three years of studies to evaluate the potential impacts of the Desert Wind Project on military radar, in the fall of 2014, Iberdrola entered into an agreement with the Department of Defense and the Department of the Navy authorizing Iberdrola "to proceed immediately with the construction and operation of the Wind Project."

(Resp's Mem. Supp. Summ. J. 16, Ex. N ¶ 2(A).) In reliance of these government approvals, Iberdrola commenced construction of the Desert Wind Project on July 14, 2015. (Affidavit of Tracey E. Davis ("Davis Affidavit") ¶ 11 (attached to Respondent's Memorandum of Law in Support of Summary Judgment).) The undisputed material facts and timeline of events clearly demonstrate that Iberdrola has not "abandoned" construction of the Desert Wind Project.

Further, as discussed above, the Grandfather Clause is clear and unambiguous: the Wind Act does ***not*** apply to either wind energy facilities or wind energy facility expansions that received a written DNH from the FAA prior to May 17, 2013. Because the Desert Wind Project received the Initial DNHs prior to May 17, 2013, it is exempt from the permitting requirements of the Wind Act. *See Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (When interpreting a statute, this court must first look to the plain meaning of the statute and where it is clear, give the statute its plain meaning.).

The plain meaning of the Wind Act also does not support Petitioners' argument. Any modifications that occurred after the Initial DNHs were issued do not convert the Desert Wind Project into a ***new*** wind energy facility or expansion. The definition of "wind energy facility" contains ***no*** language defining such facilities based upon an approved DNH. If the General Assembly wanted to define "wind energy facility" is such a manner, it could have included the language "as approved in a written DNH" or similar language. The statute does not include this language, and the court may not read this limitation into the statute even if it believes that the General Assembly inadvertently omitted this language. *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) ("[I]n effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used."); *First Union Nat. Bank v. Hackney*, 266 N.C. 17, 25, 145 S.E.2d 352, 359 (1967) ("The words of

the conjectured exception are not found in the statute, and as it is complete without them, we are not authorized to add them.").

The plain meaning of the Wind Act also shows that the Desert Wind Project is ***not*** a "wind energy facility expansion." The definition of this term clearly contemplates that only wind energy facilities that have been "permitted" are considered "expansions." *See* N.C. Gen. Stat. § 143-215.115(3). Because the Desert Wind Project never received a permit – in fact, it was intended to be excluded from the permitting process – it was not "initially permitted" and therefore is not considered an "expansion." *See Correll v. Division of Social Services*, 103 N.C. App. 562, 568, 406 S.E.2d 633, 637 (1991), *rev'd on other grounds*, 332 N.C. 141 (1992) ("In construing a statute all words are to be given effect, if possible, and the words are to be given their usual and ordinary meaning unless a contrary intention is apparent from the language in the statute.").

The types of minor modifications that the Desert Wind Project experienced following issuance of the Initial DNHs are typical of projects similar to the Desert Wind Project and were contemplated by the Wind Act. The Wind Act recognizes that wind energy facilities may be modified during the development phase of these projects. *See* N.C. Gen. Stat. § 143-215.119(d) (recognizing that during the permit application review process there may be "supplements, changes, or amendments to the permit application"). For modifications made while the permit application is pending, the Wind Act does not require a new permit application to be submitted. To hold otherwise would lead to absurd results. It would make no sense for a wind energy facility with a pending permit application to submit a new permit application each time that plans are modified. Information regarding these modifications can be submitted to Respondent through the existing permit application. Therefore, modifications during this phase of the project do not convert an existing wind energy facility into a "new" wind energy facility.

On the other hand, consistent with the definition of "wind energy facility expansion," once a wind energy facility is permitted and undergoes certain modifications, Respondent may require additional information be submitted to evaluate whether to approve or deny a permit for the facility as reconfigured:

> If the specific location of a turbine authorized to be constructed pursuant to a 'Determination of No Hazard to Air Navigation' or the configuration of the wind energy facility varies from the information submitted by the applicant ***upon which the Department has made its permit decision***, the Department may reevaluate the permit application and require the applicant to submit any additional information the Department deems necessary to approve or deny a permit for the facility as reconfigured.

N.C. Gen. Stat. § 143-215.120(c) (emphasis added). Thus, a "wind energy facility" only becomes an "expansion" when modifications are made after a permit is issued.

Therefore, based on the plain meaning of the Wind Act and associated legislative intent, the court should hold that because the Desert Wind Project received DNHs from the FAA prior to the effective date of the Wind Act, the Desert Wind Project is not a "new" "wind energy facility" or "expansion." As such, Respondent properly determined that the project is exempt from the permitting requirements of the Wind Act.

III. Petitioners' arguments that Respondent violated the Administrative Procedure Act (the "APA") fail as a matter of law.

In addition to arguing that the Wind Act should be interpreted to require that the Desert Wind Project be subject to the statutory permitting requirements, Petitioners ineffectually argue that Respondent "exceeded its authority or jurisdiction, acted erroneously, failed to act as required by law or rule, failed to use proper procedure, and acted arbitrarily and capriciously for the purposes of N.C.G.S. § 150B-23(a)." (Pet'rs' Mot. Summ. J. ¶ 6.) Each of these arguments fails as a matter of law.

To support its argument that Respondent "failed to act as required by law or rule," Petitioners rely on policies supporting the North Carolina Environmental Policy Act, N.C. Gen.

Stat. §§ 113A-1, *et seq.* ("SEPA"). The purpose of SEPA is to "encourage the wise, productive, and beneficial use of the natural resources of the State without damage to the environment, maintain a healthy and pleasant environment, and preserve the natural beauty of the State . . . ." N.C. Gen. Stat. § 113A-2. To trigger SEPA, the following conditions must be met. The proposed project must: (i) involve public funds or use public land; (ii) require state action; and (iii) have the potential for an environmental impact. N.C. Gen. Stat. § 113A-4(2); 01 NCAC 25 .0108(a).[3] Because the Desert Wind Project is not receiving public funds and will not be constructed on public land, it is not subject to the requirements of SEPA. Therefore, Petitioners' reliance on SEPA is baseless and unfounded.

Petitioners also erroneously rely on Article 7 of the Executive Organization Act of 1973, N.C. Gen. Stat. §§ 143B-275, *et seq.*, which provides among other things that it is Respondent's duty to "provide for the protection of the environment" and "provide for the . . . public health through . . . the administration of environmental health programs." (Pet'rs' Mem. Supp. Summ. J. 9 (quoting N.C. Gen. Stat. §§ 143B-279.2(1), (1b)).) Even if Article 7 of the Executive Organization Act creates a standard enforceable through the APA and reviewable by this court, which Weyerhaeuser does not concede, in issuing its determination that the Desert Wind Project is not subject to the Wind Act's permitting requirements, Respondent acted in a manner providing for the protection of the environment and public health. As discussed above, the Desert Wind Project underwent intense public and regulatory scrutiny, much of which is duplicative of the permitting later incorporated into the Wind Act. (Poff Affidavit at ¶ 8, Exs. 2-10.) Consistent with the plain meaning and legislative intent of the Wind Act, Respondent lawfully determined that the Desert Wind Project is not subject to the permitting requirements of the Wind Act.

[3] On June 19, 2015, the North Carolina General Assembly passed Session Law 2015-90 further limiting the scope of SEPA.

Petitioners also wrongly argue that Respondent "failed to use proper procedure" because the "[Wind] Act proscribes certain procedures that must be followed before such a permit may be issued." (Pet'rs' Mem. Supp. Summ. J. 10-11.) Although the Wind Act does proscribe certain requirements before a permit may be issued, *see, e.g.*, N.C. Gen. Stat. §§ 143-215.117-119, these requirements do ***not*** apply when a permit is not required. Because Respondent lawfully determined that the permitting requirements of the Wind Act do not apply to the Desert Wind Project, the "procedures" with which Petitioners claim Respondent failed to comply do not apply to the project at issue.

Petitioners also erroneously argue that Respondent acted arbitrarily and capriciously in changing its determination that the Desert Wind Project is not subject to the permitting requirements of the Wind Act. (Pet'rs' Mem. Supp. Summ. J. 11-13.) Specifically, Petitioners argue that "Respondent received no new information regarding the 2011 FAA determinations between the issuance of the March 18 and April 29 letters." (*Id.* 12.) Contrary to Petitioners' argument, following Respondent's March 18 letter, Iberdrola submitted extensive information about the Desert Wind Project to Respondent, including new information regarding the DNHs. (*See* Triebel Affidavit ¶¶ 6.a-c, Exs. 3-5.) Based on its review of this information and meetings with Iberdrola, Respondent reasonably and lawfully determined that because the FAA issued DNHs for the Desert Wind Project prior to May 17, 2013, the Desert Wind Project is not subject to the permitting requirements of the Wind Act.

WHEREFORE, Weyerhaeuser respectfully requests that the court deny Petitioners' Motion for Summary Judgment and grant such other relief as the court deems necessary.

This the 7th day of April, 2016.

KILPATRICK TOWNSEND & STOCKTON LLP

Alan H. McConnell
N.C. State Bar No. 18306
Todd S. Roessler
N.C. State Bar No. 28046
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609
Telephone: (919) 420-1700

Chad D. Hansen
N.C. State Bar No. 32713
1001 West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 607-7300
Facsimile: (336) 607-7500

Attorneys for Weyerhaeuser Company

CERTIFICATE OF SERVICE

It is hereby certified that on this date I served the foregoing **RESPONDENT-INTERVENOR WEYERHAEUSER COMPANY'S MEMORANDUM OF LAW IN RESPONSE TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT** upon all parties of record by depositing a copy thereof in the United States mail, postage prepaid and addressed as follows:

Elliot Engstrom
Civis Institute
100 S. Harrington Street
Raleigh, NC 27603

David W Schnare
722 12th Street, NW
Washington DC 20005

Asher Spiller
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-1601

Jesse Schaefer
Womble Carlyle Sandridge & Rice, LLP
555 Fayetteville Street, Suite 1100
Raleigh, NC 27601

This the 7th day of April, 2016.

Todd S. Roessler

KILPATRICK TOWNSEND & STOCKTON LLP
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609
Telephone: (919) 420-1700